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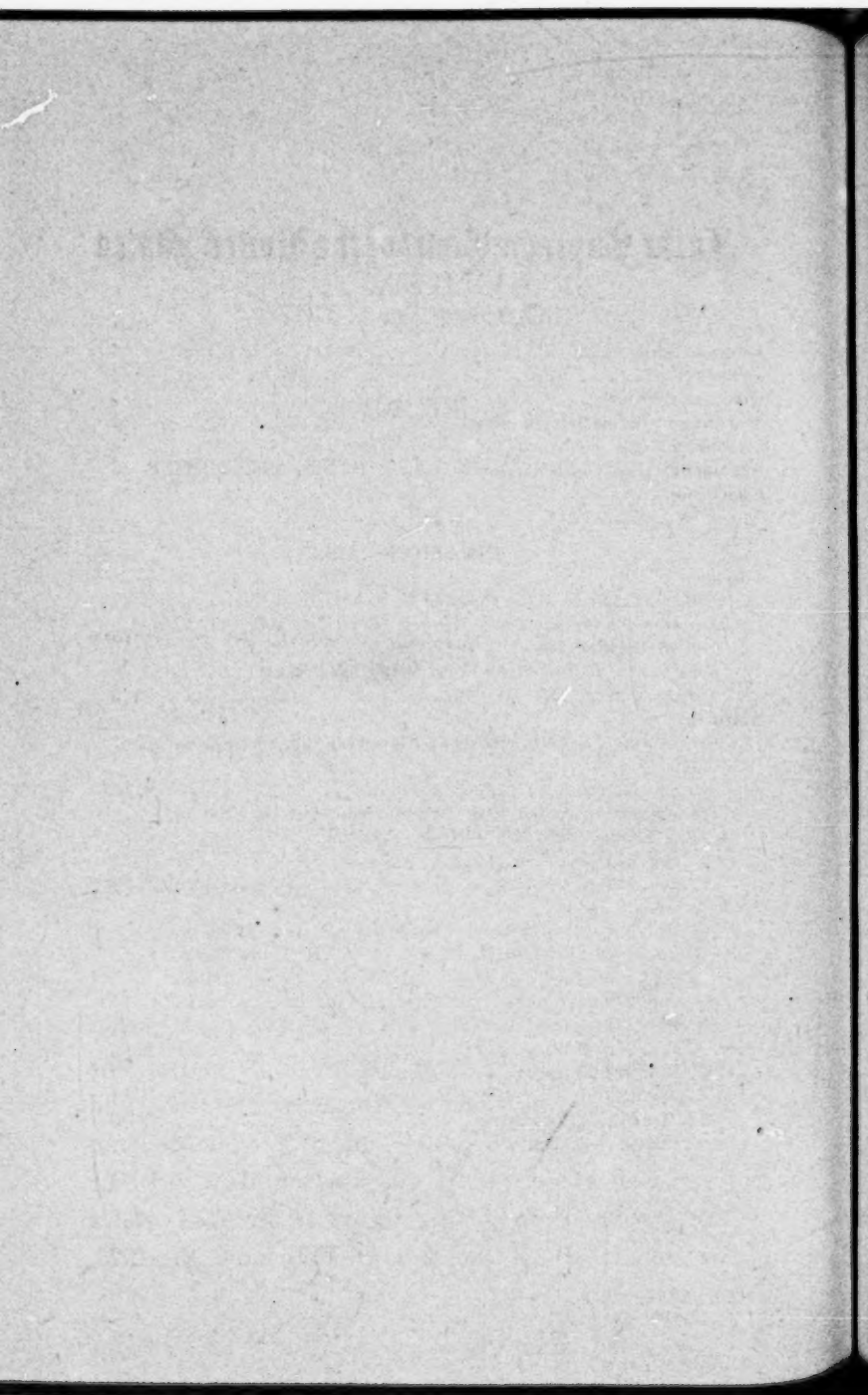
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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 102

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 83-87) is reported at 107 C. Cls. 513.

JURISDICTION

The judgment of the Court of Claims was entered on January 6, 1947 (R. 87). A motion for a new trial was filed on January 31, 1947, and overruled on March 3, 1947 (R. 87). The petition for a writ of certiorari was filed on May 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether petitioner's right to the full rate for mail carriage, under Section 321 (a) of the Transportation Act of 1940, became effective on December 7 and 11, 1940, when it submitted the public land claim releases required by Section 321 (b) of that Act, or on December 28, 1940, the date of the approval of the releases by the Secretary of the Interior, where the submitted releases admittedly did not fully comply with certain provisions of the applicable rules and regulations issued by the Secretary and petitioner requested waiver of those requirements.

STATUTE AND REGULATIONS INVOLVED

The provisions of Section 321 of the Transportation Act of 1940, c. 722, 54 Stat. 898, 954, 49 U. S. C. 65, are set forth in the Appendix, pp. 12-13. Pertinent portions of the regulations issued by the Secretary of the Interior governing releases of public land claims (6 F. R. 422, 43 CFR Cum. Supp. 273.61 *et seq.*) are set forth in the Appendix at pp. 14-15.

STATEMENT

Petitioner, a land-grant railroad eligible to receive commercial rates for carriage of government property and of mail, as authorized by Section 321 (a) of the Transportation Act of 1940 upon compliance with Section 321 (b) providing for the release of public land claims, brought this

suit in the Court of Claims to recover land-grant deductions taken by the United States on mail shipments over certain of petitioner's California lines during the period from December 6, 1940 to December 28, 1940. The sole contested issue concerns the effective date of petitioner's right to receive the full rate; and the relevant facts, which were found by the lower court as stipulated, are as follows:¹

Pursuant to General Land Office Circular No. 1480, dated October 10, 1940,² setting forth the regulations issued by the Secretary of the Interior under Section 321 (b), petitioner and its affiliated companies, on October 28, 1940, submitted to the Commissioner of the General Land Office, acting for the Secretary of the Interior, separate releases of all their land-grant claims.³ The releases had

¹ For the purposes of this brief, the truth of the findings which petitioner alleges the Court of Claims erred in failing to make (Pet. 7-9) is assumed.

² The Court of Claims was led into the inconsequential error of finding this Circular to have been issued on November 10, 1940 (R. 76) by an inadvertent error in the Commissioner's report to the court.

³ Section 273.67 of the regulations set forth in Circular No. 1480 provided as follows (R. 77):

273.67. *Validity.*—The filing of a release will not be complete and effective for the purpose of enabling the carrier to invoke the benefits of section 321 (a) of Part II of Title III of the Transportation Act of 1940 until it has been filed in the form and manner prescribed by these regulations, and until the release has been approved by the Secretary of the Interior. The company will be given prompt notice of such approval, or other action.

not been recorded in the counties in which the released land was situated, a requirement imposed by the regulations as a prerequisite to final approval. Section 273.65 (d), *infra*, p. 14. In addition, the releases were admittedly not accompanied by the certificates from the proper county officials, prescribed by the regulations (Section 273.65 (e), *infra*, p. 14), concerning the payment of taxes and freedom from mortgage liens and encumbrances; in its letters of submission petitioner explained that the submission of such certificates would be either too burdensome or, in some cases, impossible, and it requested permission to substitute for the tax certificates a bond protecting the United States against unpaid taxes, and for the certificates of non-encumbrance the affidavit of its company land commissioner, plus an indemnity agreement. (R. 77-78.)

The releases were returned, on November 22, 1940, by the Assistant Secretary of the Interior for recording; specific note was also made of the provisions of the Circular concerning the submission of proper tax and encumbrance certificates before approval, and petitioner's attention was called to the provision of the regulations making approval of the releases a precondition of their effectiveness, in so far as the Interior Department was concerned (R. 78-79).

On December 4, 1940, petitioner transmitted a surety bond to indemnify the United States

against tax liens on the lands and interests included in the releases, and requested the acceptance of this bond in lieu of the tax certificates required by the regulations (R. 79, 102-104). The difficulty and necessary delay in securing these certificates was again explained (R. 103-104). Petitioner also repeated its request that its land commissioner's affidavits of nonencumbrance be accepted in place of the official certificates required by the regulations, and the Secretary's "early decision in this matter" was prayed (R. 104). No tax or nonencumbrance certificates were ever submitted.

On December 6 and 11,⁴ petitioner and its affiliated companies returned the various releases with proof of proper recordation (R. 79-80), and these were the last documents submitted by petitioner, or on its behalf, pursuant to Circular No. 1480 or Section 321 (b) of the Act.

On December 21, 1940, the Commissioner of the General Land Office presented these releases to the Secretary of the Interior for his approval (R. 80-81). The letter of transmittal pointed out that the companies had furnished an indemnity bond against

⁴ The mail route in question included the land-grant lines, lying mainly in Southern California, which are owned by the Southern Pacific Railroad Company and leased to petitioner. The releases concerning these lines were returned on December 6 (R. 79, 110-111). The releases concerning all the other land-grant lines operated by petitioner, not involved in the present claim, were returned on December 11 (R. 80, 111).

tax liens, and their own land commissioner's affidavits of nonencumbrance, in lieu of the two sets of official certificates required by the regulations, and added that "the resident attorney of the companies requests that the bond be considered sufficient as to taxes and states that he believes it to be impossible to obtain certificates from the county officers that there are no mortgage liens or other encumbrances affecting the released lands, explaining that the record contains a certificate that the lands are free from mortgage liens and encumbrances. The bond appears sufficient to cover any taxes, and the Land Commissioner's certificate, which, as the resident attorney states has been duly filed, may be taken as satisfactory evidence of nonencumbrance." (R. 81.) The Commissioner of the General Land Office concluded that "the releases conform to the law and are in substantial accord with the regulations," and he recommended approval. On December 28, 1940, the Assistant Secretary of the Interior endorsed his approval on this letter (R. 81).

As compensation for the instant mail shipments over petitioner's lines, from December 6 to December 27, 1940, the United States made payment at the land-grant rate of 80% of the non-land-grant compensation, under the provisions of Section 5 of the Act of July 28, 1916, c. 261, 39 Stat. 412, 426, 39 U. S. C. 536, *infra*, p. 15 (R. 82). Petitioner accepted these payments under protest, claiming to be entitled to the full rate, under

Section 321 (a) of the Transportation Act of 1940, for all services rendered after December 6, 1940, or at the least, after December 11 (R. 82). The parties stipulated that if petitioner were entitled to the full rate after December 6, the sum of \$10,510.49 was owing to it for services from that date to December 28, and that if the full rate became effective on December 11, the sum owing was \$9,077.19 (R. 82).

The Court of Claims dismissed petitioner's claim (R. 83) and entered judgment against it (R. 87), on the ground that the releases, as finally submitted on December 6 and 11, did not fully comply with the applicable regulations, and it was not until the Secretary approved the deviations on December 28 that the petitioner could be said to have filed releases "in the form and manner prescribed" by the Secretary, so as to authorize payment by the Government of the full rate to petitioner (R. 86-87).

ARGUMENT

Petitioner was not entitled to receive full rates for carriage of mail or government property at least until it had submitted its release "in the form and manner prescribed" by the Secretary of the Interior. Section 321 (b), *infra*, p. 13; see *Krug v. Santa Fe P. R. Co.*, 329 U. S. 591. Admittedly, the instant releases, as finally submitted with their accompanying documents on December 6 and 11, 1940, failed to conform to the prescribed regulations in two respects, *i. e.* official

certificates of tax payment and of nonencumbrance were not supplied as required by Section 273.65 (e) of Circular No. 1480. Instead, petitioner furnished an indemnity bond in place of the tax certificates and substituted the affidavit of its own private land commissioner for the required county officials' certificates of freedom from encumbrance. In the original submission of its releases on October 28, 1940, petitioner recognized its departure from the regulations, and argued at length the convenience and suitability of the proposed substitutes (R. 93, 99-101). When the indemnity bond was transmitted to the Department of the Interior on December 4, 1940, petitioner requested its acceptance and approval of the releases "without awaiting the execution and filing of certificates of various county officers to the effect that all taxes on the lands released, and the interests therein, have been paid" (R. 103), and the reasons for Departmental approval of this deviation were reiterated; request was likewise again made for acceptance of its land commissioner's certificate in lieu of the other set of official certificates normally required; and the Secretary's "early decision in this matter" was sought (R. 104).⁵

As the Court of Claims held, it was not until the

⁵ The Department's letter of November 22, 1940, had specifically drawn petitioner's attention not only to the recordation requirement but also to the necessity of supplying the official certificates (R. 78-79).

Assistant Secretary's approval of December 28, 1940 that petitioner's admitted deviations from the Secretary's general requirements were authoritatively confirmed, and its releases could be said to have been submitted "in the form and manner prescribed" by the Secretary. The Commissioner of the General Land Office was not empowered, and did not purport to modify the applicable requirements; his letter presenting petitioner's releases for effective approval expressly pointed out the deviations and outlined the reasons urged by petitioner, with which he agreed, for acceptance of the modifications (R. 81). The Assistant Secretary, as the Secretary's deputy in these matters,⁶ was authorized to suspend the strict requirements of the regulations upon a proper showing, and the Commissioner's suggestion of approval was tantamount to a recommendation that this was a proper case for the exercise of that power. Certainly, the Assistant Secretary was free to disapprove the documents for failure to comply with the regulations and to remit petitioner to the letter of the requirements. For petitioner's benefit, and at its urging, he chose to make an exception to the general rules.

Petitioner's only answer to the lower court's conclusion that, in these circumstances, com-

⁶ Petitioner and the court below both properly assume that the Assistant Secretary's action was in all respects that of the Secretary. *Robertson v. United States ex rel. Baff*, 285 Fed. 911 (App. D. C.); *Turner v. Seep*, 167 Fed. 646 (C. C. E. D. Okla.); and see the discussion in 57 I. D. 262.

pliance with Section 321 (b) of the Act did not antedate December 28, is that the Assistant Secretary must have found the releases, as submitted, to have conformed to Circular No. 1480, since he endorsed his approval on the Commissioner's letter, which concluded that "the releases conform to the law and are in substantial accord with the regulations" (R. 81) (Pet. 4, 7, 10, 20). Aside from the unwarranted assumption that the Secretary's endorsement approval of the releases implied adoption of the form of the Commissioner's conclusion, petitioner errs in reading the Commissioner's words "substantial accord" to mean that the requirements of the regulations had been fulfilled in terms. The text and context of his letter make it clear that he intended no more than that petitioner's proposed substitutes for the required official certificates adequately served the same purposes, in the circumstances of this case, and the strict provisions of the regulations might therefore well be waived. Moreover, even if the intention of the Assistant Secretary and the Commissioner were less clear, the resolution by the Court of Claims of such a factual issue would not be open to attack, especially since, in land-grant matters, the rule of strict construction against the railroad applies in full vigor. Cf. *Northern Pacific Ry. Co. v. United States*, No. 400, Oct. T. 1946, decided March 3, 1947.

Nor does it advance petitioner's case to contend that the Secretary could not, by *ad hoc* action,

modify or waive the general regulations. At least as between the Government and petitioner, the Secretary was empowered to relax the normal certificate requirements for petitioner's benefit where harm to the interests of the United States would not result. In any case, petitioner cannot rely upon such supposed lack of authority, since on that assumption its undisputed deviations from the promulgated regulations would have compelled disapproval of the submitted releases. Petitioner would then have been forced to await either compliance with the allegedly burdensome certificate requirements of Circular No. 1480, or the publication of a general modification of the original regulations. Petitioner obtained only benefit and suffered no injury from the waiver exercised in its case.

CONCLUSION

The decision below is clearly correct, and the case involves an issue peculiar to petitioner's particular releases of its land-grant claims. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

PEYTON FORD,
Assistant Attorney General.

PAUL A. SWEENEY,
OSCAR H. DAVIS,

Attorneys.

JULY 1947.

APPENDIX

1. Section 321 of the Transportation Act of 1940, Act of September 18, 1940, c. 722, 54 Stat. 898, 954, 49 U. S. C. 65, is as follows:

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for the transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

2. Circular No. 1480 issued by the Secretary of the Interior on October 10, 1940 (6 F. R. 422, 43 CFR, Cum. Supp. 273.61 *et seq.*) provides in part as follows:

* * * * *

SEC. 273.65. *Manner of release.*—The following requirements are hereby prescribed as the manner of filing a release:

* * * * *

(d) The original release must be recorded at the carrier's expense in each county in which the released lands, or interests, are situated when returned by the Secretary of the Interior for that purpose, except in the case of carriers whose grants have been finally adjusted and closed.

(e) The release, with satisfactory evidence of recordation, must be submitted to the Secretary of the Interior for approval, with a certificate from the proper county officer of each county in which any of the released lands, or interests, are situated, showing that all taxes which have been assessed against the lands or interests therein or which could have operated as a lien thereon at the date of the recordation of the release have been fully paid, and that the titles and interests also are free from mortgage liens and other encumbrances. If the lands are affected by tax liens, or taxes which are not due and payable at the date of recordation of the release, the carrier will be required to furnish a bond with corporate surety or make a cash deposit in the General Land Office in the sum of at least twice the amount of the taxes for the preceding year. If a cash deposit is made, the same will be returned when a receipt is

filed showing that full payment of the taxes has been made.

(f) The execution of the release in the manner provided in this section must be authorized by a resolution of the board of directors of the interested company or in some other legal manner, and should be accompanied by an authenticated copy of such resolution or other authorization. The release must bear the seal of the corporation and be signed, executed, and acknowledged by the proper officer for the company.

* * * * *

§ 273.67. *Validity.*—The filing of a release will not be complete and effective for the purpose of enabling the carrier to invoke the benefits of section 321 (a) of Part II of Title III of the Transportation Act of 1940 until it has been filed in the form and manner prescribed by §§ 273.61–273.67, and until the release has been approved by the Secretary of the Interior. The company will be given prompt notice of such approval, or other action.

3. Section 5 of the Act of July 28, 1916, c. 261, 39 Stat. 412, 426, 39 U. S. C. 536, provides in part as follows:

Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section [*i. e.* sections 524–541, 542–568 of 39 U. S. C.].